Before the
Federal Communications Commission
Washington, D.C 20554

In the Matter of	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85

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COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

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SUMMARY

This proceeding is an important step to implement the decreased regulation of the cable television industry intended by Congress in the Telecommunications Act of 1996. LEC provision of video programming will be an important means of stimulating innovative services and the deregulation of the industry as a whole

The Commission's work to craft the appropriate standards for effective competition is of vital importance. Effective competition will be possible only when LECs gain access to video programming, including local origination, on the same terms and conditions as incumbent cable operators. The Commission should modify its rules to provide for parity of access to video programming in these circumstances.

In keeping with the Congressional mandate to introduce market forces in the video arena, the Commission should refrain from introducing regulations when Congress has been silent. Congressional decisions not to include specific requirements, such as specific pass or penetration rates, should be accorded deference by the Commission.

USTA also recommends that the Commission retain its existing approach and continue to apply the Title VI definition of "affiliate" to matters properly under the authority of Title VI. Although the 1996 Act introduced a new definition of affiliate in Title I, Congress chose not to modify or delete the existing definition in Title VI. The Title VI definition's emphasis on control, rather than a percentage threshold as a matter of affiliation, is appropriate for the new video marketplace. Together with the Commission's efforts to protect consumers, a definition based on control will permit introduction of new services while safeguarding consumers during the transition to the market.

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I. INTRODUCTION

The United States Telephone Association ("USTA") respectfully submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-captioned docket.[1/] USTA is the major trade association of the local exchange carrier ("LEC") industry, with over 1,000 members.

In this proceeding, the Commission seeks to achieve the decreased regulation of the cable television industry as intended by Congress in the Telecommunications Act of 1996 (the "1996 Act").[2/] USTA supports the Commission in its important work of implementing the 1996 Act. The *Notice* begins the process of streamlining regulatory burdens in the cable industry and relying on the marketplace and competition to the maximum extent feasible. With sufficient safeguards to protect consumer welfare, USTA

1/ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 96-85, FCC No. 96-154, released April 9, 1996 (hereafter "*Notice*").

2/ Telecommunications Act of 1996, amending the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

believes that the Commission in this proceeding can help stimulate new video services, economic growth and consumer choices for the 21st century.

II. THE COMMISSION SHOULD SAFEGUARD CONSUMER WELFARE BY ENSURING TRULY EFFECTIVE COMPETITION.

A. The Comparable Programming Standard Must Address Parity Of Access To Programming.

Congress explicitly linked decreased regulation and streamlined processes with the development of video competition in the 1996 Act. The continuing requirement to subject cable operators to rate regulation in the absence of "effective competition" makes this clear.[3/] Determining the appropriate standards for effective competition is therefore one of the most urgent tasks before the Commission in this proceeding.

The 1996 Act amended the definition of effective competition by adding an important alternative. As amended, under this alternative, effective competition exists if a:

> local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.[4/]

3/ *Id.* at § 301(b)(2).

4/ *Id.* at § 301(b)(3)(C), *codified at* Communications Act § 623(l)(1)(D).

The pro-competitive thrust of this amendment is clear. USTA believes that LEC provision of video programming will be an important means of stimulating competition and innovative services.

The *Notice* asked for comments on the Congressional determination that 12 channels of programming would be sufficient to constitute "comparable" programming.[5/] USTA agrees with the Commission that Congress appears to have spoken clearly on this matter.[6/] However, while the number of channels offered is important, the programming carried on those channels is critical. Congress and the *Notice* acknowledged as much by noting that "comparable programming" should include broadcast signals. Parity of access to programming is a broader concept, since LEC competition to cable incumbents is possible only if the LECs, like cable operators, can provide a variety of commercial programming, as well as local sports, news and special interest items. Once a LEC has access to programming comparable to that afforded cable operators, whether the LEC elects to offer 12, 24 or 30 channels should be a business decision based on the programming it chooses to offer.[7/]

5/ *Notice* at ¶ 69.

6/ Joint Explanatory Statement, Conference Report at p. 170 ("The conferees intend that 'comparable' requires that the video programming services should include access to at least 12 channels of programming, at least some of which are television broadcast signals.")

7/ The Commission, for example, reported to Congress in 1994 that 78% of all cable systems offer 30 or more channels. Moreover, 97% of all cable subscribers receive service from systems with over 30 channels. *See Second Report to Congress on Video Competition,* CS 95-61 (December 11, 1995). USTA believes that with parity of access to programming, LECs will be able to offer the kinds and scope of programming that the market will demand.

USTA believes that "comparability" can be ensured only if LECs obtain parity of access to video programming. Parity of access is an essential pre-condition to LECs' provision of meaningful and fair competition to incumbent cable operators, due to the concentration of control over vast portions of existing and newly produced commercial programming among a handful of vertically integrated cable operators. Lacking such parity, LECs' efforts to compete will be hindered and the conditions (i.e., "comparable" programming) will not exist where cable operators can or should be subject to lessened regulation. Congress' goals will not be achieved and consumers will also suffer through higher prices, fewer services and less innovation. Only incumbent cable operators will benefit from such an outcome. Without proper access rules, those operators that control programming will be able to evade the intent of the effective competition test.

USTA submits that this is the single most important issue for the Commission in determining "comparable" programming. Parity of access to programming is fundamental to permitting competition to determine the evolution of the video programming marketplace. With access to the same programming as an incumbent cable operator, LECs will be able to enter the market based on consumer demands for the type and scope of service to be offered. Parity does not ensure the LECs will succeed -- that depends on providing good service to consumers and the successful execution of a competitive business plan. The Commission, by ensuring parity of access, will provide all participants, LECs as well as cable operators, an equal chance to succeed.

USTA respectfully requests the Commission to take action in this docket on access to programming issues. The Commission's current program access rules do not apply to

programming distributed by cable affiliated entities using terrestrial systems.[8] USTA believes that the Commission should specifically condition elimination of cable rate regulation on a prerequisite showing by the cable operator that the LEC and its affiliates have parity of access to programming subject to the control of the operator or its affiliates on comparable terms and conditions. The Commission should modify Rule 76.915.[9] USTA also urges the Commission to modify Rule 76.1000(e) to make clear that it includes open video systems ("OVS").[10] In addition, the Commission should modify Rule 76.1001-1003,[11] to make clear that LECs have a clear basis to initiate adjudicatory proceedings should they be denied parity of access to programming.[12]

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[8] *Cf.* 47 C.F.R. §76.1002(b) (1995) (setting forth requirements for satellite cable programming vendors and affiliates to offer non-discriminatory prices, terms and conditions). As described in detail in its Reply Comments in the Open Video Systems ("OVS") proceeding, CS Docket 96-46, Tele-TV has first hand experience with the obstacles that the current program access regime presents.

[9] 47 C.F.R. §76.915 (1995).

[10] Rule 76.1000(e) currently reads:

Multichannel video programming distributor. The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive only satellite program distributor, and a satellite master antennae television system operator, as well as buying groups or agents for all of such entities.

47 C.F.R. § 76.1000(e) (1995).

[11] *See* 47 C.F.R. § 76.1003 (c) (setting forth requirements for complaints under the section).

[12] The new section 76.1004 proposed in the *Notice* appears, paradoxically, to place program access obligations on LEC video operations without affording them necessary program access protections.

The Commission, by addressing parity issues in this proceeding, will take a major step towards giving real effect to the statutory intent of fostering competition. Modifying existing rules to ensure equal access to programming will spur the provision of new services for consumers[13/] and lower prices through competition.

B. The Commission Should Adhere To The Plain Language Of The Statute.

1. SMATV Should Be Treated Like Direct-To-Home Satellite Service When Determining Effective Competition.

The *Notice* raised the issue of whether satellite master antenna television ("SMATV") should be considered when determining "effective competition" under the newest prong of the statutory test. By its nature, SMATV is not an appropriate means to determine whether effective competition exists. The footprint of a SMATV signal is quite limited, frequently confined to a relatively small area such as a multiple dwelling unit ("MDU") building. End-users subscribe to the SMATV service and receive delivery of the video programming through a wire.

Congress specified in the 1996 Act that LECs provide effective competition for cable incumbents when the LEC offers video services "by any means"[14/] (other than direct-to-home satellite services). The legislative history refers specifically to MMDS, LMDS, OVS

13/ USTA also supports the Commission's tentative conclusion that it should focus on how service offerings will affect competition rather than on the formal ownership status of facilities. Notice at ¶ 71. USTA agrees that the new test for effective competition should apply regardless whether the LEC or its affiliate is the video service provider or the licensee or owner of the facility. The Commission should focus on the LEC's access to the market and the effect on competition.

14/ 1996 Act at §301(b)(C)(3), *codified at* Communications Act § 623(l)(1)(D).

and cable.[15] USTA supports as liberal a reading of this provision as is feasible so as to lessen the regulatory burden on all participants in the video market. Nonetheless, SMATV is not included in the illustrative list of services provided by Congress. USTA believes this absence to be significant. The goal of the effective competition standard is to determine how the marketplace is affected by new entrants. Given the small numbers of subscribers within SMATV's limited service footprint, the mere presence of that service would be an unreliable benchmark to determine the presence of effective competition. Congressional silence here should be accorded deference. USTA urges the Commission to refrain from introducing unnecessary regulations without an explicit directive from Congress.

2. The Commission Should Not Impose Penetration Or Pass Rates To Determine Competition.

The new test for effective competition in the 1996 Act differs significantly from the three existing prongs in the 1992 Cable Act.[16] Unlike the existing definitions, the new

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[15] Joint Explanatory Statement, Conference Report at p. 170.

[16] Section 76.905(b) of the Commission's rules incorporates the statutory definition of "effective competition" in the 1992 Cable Act. Under the three existing tests, "effective competition' exists when:

> (1) Fewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system;
>
> (2) The franchise area is: (i) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video

(continued...)

definition does not include a percentage pass or penetration rate. Congress clearly was aware of the tests in the 1992 Cable Act and chose not to include pass or penetration rates. Again, the Commission should not act in the face of Congressional silence. Rather, the Commission should focus its attention on addressing market entry opportunities through parity of access to programming.

C. The Commission Should Define "Affiliate" Consistent With Congress' Intent To Foster Competition.

As the Commission notes, the 1996 Act does not specifically address the definition of "affiliate" for the purposes of the effective competition test or other parts of Title VI.[17] In the 1996 Act, Congress added a new definition of affiliate to Title I:

> . . . a person that (directly or indirectly) owns or controls, or is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.[18]

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[16](...continued)

> largest multichannel video programming distributor exceeds 15% of the households in the franchise area; or
>
> (3) A multichannel video programming distributor, operated by the franchising authority for that franchise area, offers video programming to at least 50 percent of the households in the franchise area.

47 C.F.R. § 76.905(b).

[17] *Notice* at ¶¶ 15-16, 74-77, 82-83, 95-96.

[18] 1996 Act, § 3(a)(2), *codified* at Communications Act, § 3(33).

The *Notice* recognized that this definition does not necessarily apply to matters under Title VI, since Title VI contains a pre-existing definition that does not set a percentage threshold as to what constitutes ownership. Under Title VI:

> [w]hen used in relation to any person, [affiliate] means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person. [19/]

USTA agrees with the Commission that the definition of affiliate incorporated in Title I of the Communications Act does not strictly apply to matters under Title VI, because Title VI has a separate definition of the term.[20/]

The Commission should not apply the Title I definition of affiliate to matters in Title VI. The Commission has substantial experience in applying the Title VI definition in such cases, and has properly exercised its discretion to define the affiliate relationship more specifically when necessary, based on that definition. It should continue to do so.[21/] Congress certainly was aware of the Commission's previous jurisprudence and methodology, and the discretion it has exercised in this area. Congress did not choose to change or delete the Title VI definition. Under principles of basic statutory construction, the presumption should be that the Title VI definition governs implementation of the provisions of Title VI.

19/ Communications Act, § 602(2).

20/ *Notice* at ¶ 16.

21/ The Commission's use of a 20 percent threshold figure for its small system rules is well-suited for that purpose and to address the new provisions regarding small cable operators in the 1996 Act. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 7393, 7407 (1995) [hereafter *Small System Order*]. It should not govern the industry with respect to effective competition, OVS rules or the buy-out provisions.

1. The Title VI Definition Of Affiliate Supports Effective Competition.

The Commission should use the Title VI definition in interpreting the new test for effective competition. The new definition of affiliate in Title I applies "for purposes of this Act unless the context otherwise requires . . ."[22] This proceeding requires otherwise. The Commission should look to the marketplace to determine when effective competition exists. The blanket 10 percent benchmark for affiliation defined in Title I will not reflect the competitive participation of LECs in the video market place as well as the "control" standard of the Title VI definition.

The emphasis in the Title VI definition of affiliate on ownership and control is consistent with the important policy goal of permitting flexible business arrangements for increased competition. All players in the video programming marketplace may be expected to explore partnerships and alliances to bring innovative services to the public. In this era of such convergence, an arbitrary threshold of 10 percent on affiliation might serve as an unintended brake on competition.

2. The Title VI Definition Of Affiliate Is Appropriate For OVS And The Buy-Out Provisions of Section 302 of the 1996 Act.

The focus on control set forth in the Title VI definition of "affiliate" should also govern the meaning of affiliation in both the OVS and cable-telco buy-out provisions of the 1996 Act. Congress intended OVS services to be a new method of fostering innovation and

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[22] 1996 Act § 3(b).

competition. To further this end, Congress provided for reduced regulatory burdens for an OVS operator upon compliance with very limited Commission regulation.[23/] In light of such limited regulation, which is designed to permit the proper functioning of market forces and competition, an arbitrary percentage determination of ownership is unnecessary. A definition of affiliation premised upon control is consistent with Congressional intent because it will lessen the regulatory burden on OVS providers This reduced burden will allow OVS providers to explore partnerships and relationships that will be needed to enter the market most effectively. The Commission, by implementing limited regulations will be able to ensure that consumers are protected during the transition to competition.

The Title VI definition of affiliate based on control is also appropriate for the cable-telco buy-out provisions in the 1996 Act.[24/] In this case, Congress already specifically

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[23/] 1996 Act, § 653(b)(1).

[24/] The 1996 Act provides:

> (a) Acquisitions by Carriers. No local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area.
>
> (b) Acquisitions by Cable Operators. No local cable operator or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area

1996 Act at § 652 (a), (b)

limited cross-ownership by either a LEC or cable operator to 10 percent. This limited ownership ceiling is intended to help maintain competition and the proper functioning of market forces. The Commission can best support this policy by adopting a definition of affiliate that is flexible enough to permit all involved to assemble the strategic relationships best suited to meeting market demands and consumer need. An additional 10 percent ownership threshold, as would be required by the use of the Title I definition of affiliate, would be redundant to the requirement already established in Section 652. Such a restrictive interpretation poses the risk of retarding introduction of new services and competition.

USTA therefore recommends that the Commission define affiliation under Title VI in terms of control for the purposes of OVS and cable-telco buyouts. By focusing on control, the Commission will be able to protect consumers and still permit all involved to establish the varied relationships that will be needed to build market -based competition.

D. The Commission Should Ensure That Truly Small Cable Operators Be Accorded Prompt Regulatory Relief.

In the 1996 Act, Congress determined that cable operators with less than 1% of all nationwide cable subscribers are entitled to prompt and effective regulatory relief.[25/] USTA supports the removal of regulatory burdens on small cable operators. The Commission can help stimulate the market for video programming service by moving quickly to give effect to this mandate.

[25/] 1996 Act, § 301(c), *codified at* Communications Act, § 623(m)(2).

USTA agrees that the methodology used by the Commission to determine which operators qualify as small is important. Moreover, the need for certainty and the absence of administrative burdens are important if such small operators are to benefit as Congress intended. For those reasons, USTA supports the Commission's tentative conclusion to establish an annual threshold number for such operators. An annual determination simplifies the administrative burden for all involved. It also provides the certainty necessary to attract capital and execute business plans.

USTA urges the Commission to devote attention to the proper definition of affiliate in this instance. Congress specifically directed that relief be provided to those small operators who are truly small. Nothing would undermine the plain meaning of the 1996 Act more than to have operators gain the benefits of "small" status undeservedly. For this reason, USTA believes that an exception should be made to the general rule that affiliation should be defined based upon control. The exception is warranted because of Congress' intent to introduce prompt and immediate regulatory relief for small cable operators.

Specifically, USTA supports the Commission's tentative conclusion that, consistent with its discretion in applying the Title VI definition of affiliate and its "small system" rules, a 20% ownership interest, active or passive, constitutes an affiliation. This specific exception to the general rule that affiliation should be defined by control will is well

grounded in precedent.[26] It will help to make sure that the regulatory relief intended by Congress is actually granted to those entitled to it.[27]

The 1996 Act states that small operators may not be affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250 million. USTA believes that proper determination of gross revenue in this context will be critical to protecting the interests of consumers. The Commission's proposed definition of "gross revenues" does not adequately promote innovation and competition.[28] Rather than focus on all income, passive or otherwise, USTA believes that the Commission should consider gross income from the cable operator's (or its affiliates') provision of cable services.

III. CONCLUSION

For the reasons discussed herein, USTA respectfully urges the Commission to adopt flexible and market-oriented approaches. Decreased regulation and streamlined procedures in the cable industry are an important step in fulfilling the determination to rely on market

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[26] As noted above, the Commission exercised its discretion with respect to its pre-existing rules for small cable operators. See *Small System Order*, 10 FCC Rcd at 7407.

[27] USTA, of course, supports the Commission's statements that de facto control would also constitute an affiliation.

[28] The Commission proposed that:

> Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited quarterly financial statements for the relative period.

Notice at ¶ 84.

forces when feasible. The Commission in this proceeding lays the basis for protecting consumers during the transition period to full competition and the introduction of new video services and opportunities for communities nationwide. The Commission can best fulfill this historic mission by strengthening effective and meaningful competition as described above.

Respectfully submitted,

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